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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 6, 7 and 8.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES De FERRY De FONTNOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES on the Relation of B. COLES NEIDECKER,

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES on the Relation of GEORGE W. NEIDECKER,

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel for Petitioners.

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In this reply brief we shall deal with two points raised in the brief of respondents:—first, the claim that the construc-

tion for which we contend would render the Treaty unconstitutional; and second, the claim that the English decisions cited in our main brief are inapplicable because the English constitutional system is different from ours.

The claim that the construction for which we contend would render the treaty unconstitutional.

At pages 39-44 of the respondents' brief, it is argued, upon the authority of *Schechter* v. *United States,* 295 U. S. 495, that a construction of the Franco-American Treaty as giving to the Executive any discretion over the extradition of American citizens would render the Treaty unconstitutional. Respondents, in fact, go to the length of saying (page 43 of their brief), that even an express grant of Executive discretion in so many words in a Treaty (such as is contained in the present Treaties with Guatemala, Mexico, Nicaragua and Uruguay) would be ineffective and void.

In the same connection it is argued that the English decisions cited in our main brief cannot be applicable, since in England, unlike the United States, there is nothing to prevent Parliament from delegating its powers to the Executive.

It is difficult to take either of these arguments seriously. The delegation of discretion within reasonable limits to the Executive is of course unobjectionable.

> *Mahler* v. *Eby,* 264 U. S. 32;
> *Union Bridge Co.* v. *United States,* 204 U. S. 364;
> *Hampton & Co.* v. *United States,* 276 U. S. 394.

The discretion for which we contend is obviously not an arbitrary or unreasonable discretion. We make no such claim as is asserted at page 42 of respondents' brief, that the Executive has "an absolute discretion, unguided by any standard, to deport or to refuse to deport, an American citizen." No matter what the citizenship of the accused, the Executive

cannot raise a finger to deport him until three things have been established:

1. There must first be a treaty, duly ratified by the Senate and made a part of the law of the land, specifying certain definite offenses as extraditable.

2. It must be shown that the offense with which the accused is charged is one of those falling within the list enumerated by the treaty.

3. Finally, there must be a full hearing before a judicial officer at which the accused may be heard in his defense, and the judicial officer must be satisfied that there is probable cause for believing him guilty of the offense charged.

Not until all three of these conditions have been satisfied can the Executive surrender *any* person, whether foreign or American. All that we contend is that, after all these three conditions have been satisfied and a judicial hearing held, the Executive can then in its discretion, and without breach of treaty obligations, determine whether it will surrender an American citizen or not; whereas in the case of anyone other than an American citizen, the Executive is required, under penalty of breach of faith, to make the surrender in any event.

It is hard to see how an American citizen can complain that he is being discriminated against by being put on a more favored basis than an alien, by being given an opportunity to appeal to the discretion of the State Department, after a magistrate has found against him.

It is equally hard to see how anyone can complain that he is being deprived of due process by being given the chance of Executive discretion *in his favor* after a judicial officer has certified that he is probably guilty of an extraditable crime. The discretion, such as it is, is obviously all in favor of the accused. If an alien is held for extradition to France, and the magistrate has found probable cause for believing

him guilty, the Executive must either surrender him or face the consequences of a breach of the Treaty. The only difference in the case of an American citizen is that the Executive may, without violating the Treaty, decide to set him at liberty. If it sets him free, he is obviously not in a position to complain. The discretion, such as it is, is no more hostile to the accused than is the existence of the power to pardon or parole convicted criminals. It could scarcely be contended that the existence of the Federal Parole Board, with a discretionary power to release prisoners before they have served their full sentence, renders the entire system of criminal law arbitrary and unconstitutional; yet that, in substance, is the position for which respondents contend.

In *Cusack Co.* v. *City of Chicago,* 242 U. S. 526, a city ordinance prohibiting the erection of billboards in residence districts in the interest of safety, morality, etc., was claimed to be unduly discriminatory and arbitrary, as such erection of billboards was nevertheless permitted in certain districts if the consent in writing was obtained of the owners of a majority of the frontage on both sides of the streets in which such billboard was to be erected. To this contention the court answered (p. 530):

> "The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler* v. *Judges of Registration,* 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531."

Further, respondents' argument, if it proves anything, proves too much. At page 13 of our main brief, we have already noted that under the Statute the last word in *every* extradition case, after the courts have acted, is with the State Department. The Statute (U. S. Code, Title 18, Sec. 653) does not require the Secretary of State to surrender a fugi-

tive in any case, but provides merely that after the magistrate has certified his determination against the accused, *"it shall be lawful"* for the Secretary to make the surrender; and this has been construed as giving the Secretary a discretionary right to refuse to make the surender in any case. (See authorities cited at page 13 of our main brief).

Even if the language of the Statute were to be regarded as imperative, it would not give rise to any obligation enforceable in the courts. Even in the case of an alien who has been duly committed after hearing to await extradition, the Secretary can always refuse to surrender him and set him free, regardless of the magistrate's findings. It is true that in the case of an alien, where the Treaty obligation to surrender is absolute and unqualified, such an act might properly be regarded by the foreign Government concerned as a breach of the Treaty; but it would not be a breach of which the courts could take cognizance. The courts could not mandamus the Executive to compel the surrender of the accused to a foreign country, any more than they can mandamus a Governor to surrender a fugitive to another State of the Union (*Kentucky* v. *Dennison,* 24 How. 66), or any more than they can mandamus the Executive to hang a convicted murderer who has refused to accept a commutation of his sentence (*Biddle* v. *Perovich,* 274 U. S. 480, 487).

The claim that the English decisions cited in our main brief are inapplicable because the English constitutional system is different from ours.

At pages 45-53 of respondents' brief the argument is made that English decisions cannot be accepted as a guide because of a difference in the English Constitutional system, and because of an alleged difference in the English extradition laws.

This contention is obviously unsound. Extradition proceedings in England under the Extradition Act of 1870* are substantially identical with extradition proceedings here under Revised Statutes 5270 (U. S. Code, Title 18, Section 651): In both cases a Treaty must exist before the Statute is called into operation. In England there must not only be a Treaty, but an Order in Council specifically reciting the Treaty and declaring the Extradition Act applicable thereto.

Respondents, in seeking to distinguish *In Re Galwey* [1896], 1 Q. B. 230, says at pages 48-49 of their brief:

> "The English Extradition Act of 1870, in Section 6 thereof, provides that where that Act is made to apply by treaty in the case of any foreign state, every fugitive criminal of that state, who is in or suspected of being in that part of Her Majesty's Dominions covered by the treaty, shall be liable to be apprehended and surrendered in the manner provided by the Act. *It is at once apparent that this Act creates a power in the Executive to surrender for extradition any person, whether a British subject or not.* It confers upon the Executive authority the broadest possible power, without constitutional limitation, except that some Treaty must exist making the statute applicable to the foreign state demanding the fugitive."

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* Section 2 of the English Extradition Act of 1870 provides that the Act may be made to apply by Order in Council to any foreign state with which an extradition treaty has been made, subject to certain restrictions (not here material) laid down in Sections 3 and 4.

Section 6 of the Act provides:

> "Where this Act applies in the case of any foreign State, every fugitive criminal of that state who is in or suspected of being in any part of her Majesty's Dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act."

Subsequent provisions set forth almost exactly the same machinery (preliminary warrant by a magistrate, hearings before the magistrate on probable cause, certification of the magistrate's findings and evidence to the Foreign Office, commitment by the magistrate, and surrender by the Foreign Office after such hearing and certification) as are provided by U. S. Code, Title 18, Sections 651 and 653.

This language, however, overlooks the specific holding of the English Courts in *The Queen* v. *Wilson,* 3 Q. B. D. 42, (cited at pp. 9-10 of our main brief). In that case the Extradition Act of 1870 existed, and there was a Treaty under which the Act was called into operation. But the Treaty in that case, unlike the Treaty which was before the Court *In Re Galwey,* and unlike the Franco-American Treaty here presented, left no room for discretion, and expressly provided "that no subject of the United Kingdom *shall be delivered up.*"

The Court accordingly held that under the combined effect of this Treaty and the Extradition Act of 1870 there was *no power in the Executive* to surrender British subjects. Consequently the argument that the Extradition Act of 1870 creates any broad power in the British Executive, independent of Treaty, falls to the ground. While it is true that in England a treaty does not of itself become a part of the law of the land, the fact remains that in England, as here, the statutory machinery for extradition is only brought into operation when there is an applicable treaty to set it going. And in England, as here, it is the language of the Treaty which is decisive upon the question whether a particular individual is extraditable or not.

CONCLUSION.

It is accordingly respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed and the Respondents remanded for the purpose of extradition hearings according to law.

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